Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

No. 77-919

eme Court of the United States

October Term, 1977

RICAN COMMODITY OPTIONS CORP.,
PETITIONER

v.

FUTURES TRADING COMMISSION

A WRIT OF CERTIORARI TO THE UNITED OF APPEALS FOR THE SECOND CIRCUIT

HE COMMODITY FUTURES TRADING MMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	15

CITATIONS

Cases:

Albermarle Paper Co. v. *Moody*, 422 U.S. 405	10
American Export & Isbrandtsen Lines v. *Federal Maritime Commission*, 334 F. 2d 185	10
Barchi v. *Sarafan*, 436 F. Supp. 775	12
British American Commodity Options Corp. v. *Bagley*, 552 F. 2d 482, certiorari denied, Nov. 7, 1977 (Nos. 77-96, 77-204)	4
Citizens for Allegan County, Inc. v. *Federal Power Commission*, 414 F. 2d 1125	10
Committee for Open Media v. *Federal Communications Commission*, 543 F. 2d 861	13
Commodity Futures Trading Commission v. *Crown Colony Commodity Options, Ltd.*, 434 F. Supp. 911	8
Commodities Futures Trading Commission v. *J. S. Love & Associates Options, Ltd.*, 422 Supp. 652	8
Hecht Co. v. *Bowles*, 321 U.S. 321	7
Kelly v. *Carr*, CCH Comm. Fut. L. Rep. ¶ 20, 514	8
McComb v. *LaCosa Del Transporte, Inc.*, 167 F .2d 209	10
Pan-Atlantic Steamship Corp. v. *Atlantic Coast Line Railroad Co.*, 353 U.S. 436	13
Producers Livestock Marketing Ass'n. v. *United States*, 241 F. 2d 192, affirmed *sub nom. Denver Union Stockyard Co.* v. *Producers Livestock Marketing Ass'n.*, 356 U.S. 282	10

235-778—78——1

	Page
ission v. *Capital Gains*	
S. 180	7, 8
ssion v. *First American*	
673	8
ission v. *Keller Corp.*,	
	8
ission v. *Management*	
	7–8
ission v. *Manor Nurs-*	
82	8
ission v. *World Radio*	
	7, 10
e Nemours & Co., 366	
	10
Co. v. *Federal Power*	
	10
, 148 F. 2d 604	10
	13, 14
	11
Stat. 998, as amended	
1 *et seq.*:	
2	2
	2, 12
2)	4
4)	3
7)	2, 3, 4, 5
S.C. 6n(7)(B)(ii)	2, 3
	3
	2, 5, 8
(2)	2, 3, 4, 5, 11, 12
34, 48 Stat. 881, as	
78a, *et seq*	5
	14

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-919

BRITISH AMERICAN COMMODITY OPTIONS CORP.,
PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 560 F. 2d 135. The opinion of the district court (Pet. App. A) is reported at 422 F. Supp. 662.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1977. A timely petition for rehearing was denied on September 27, 1977. The petition for a writ of certiorari was filed on December 27, 1977. The

ity of interstate commerce, in connection with his business as such * * *."[1]

To assure that unsuitable persons do not act as commodity trading advisors, Congress in Section 4n (7) of the Act, 7 U.S.C. 6n(7), authorized the Commission, after hearing, to deny registration to any person if the Commission finds that such denial is "in the public interest" and that the applicant or any officer, director or controlling person of the applicant has engaged in certain disqualifying conduct or is subject to a specific enumerated disability, including being "permanently * * * enjoined by order, judgment or decree of any court * * * from engaging in or continuing any conduct or practice * * * in connection with the purchase or sale of * * * securities * * *." Section 4n(7)(B)(ii), 7 U.S.C. 6n(7)(B)(ii). The Commission is also empowered under Section 8a(2), 7 U.S.C. 12a(2), to refuse to register a commodity trading advisor if, after opportunity for hearing, the applicant is found unfit to engage in the activity for which registration is sought, *inter alia,* "because such applicant * * * at any time engaged in any practice of the character prohibited by this [Act] or * * * for * * * other good cause shown * * *."

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[1] In addition Congress also imposed upon commodity trading advisors various recordkeeping, reporting, disclosure and other regulatory requirements. See Sections 4n(4) and 4*o* of the Act, 7 U.S.C. 6n(4) and 6*o*.

Pursuant to Section 4n(2) of the Act, 7 U.S.C. 6n (2), registration as a commodity trading advisor ordinarily will become "effective thirty days after the receipt of * * * [an] application by the Commission * * *." Pending a final determination of an applicant's fitness for registration in an administrative proceeding held for that purpose, however, Section 8a(2) provides that "registration shall not be granted."

2. The evidence, as set forth in the opinion of the court of appeals (Pet. App. 30a–32a), established that in October 1975—five months after the registration requirement for commodity trading advisors became effective—petitioner commenced to offer and sell commodity options to the public.[2] In doing so, petitioner routinely advised customers by telephone and through the mails as to the value of commodities and provided the public with analyses and reports concerning commodities, receiving compensation through the sale of options to its customers. Nevertheless, it was not until March 17 or 18, 1976, that petitioner applied to the Commission for registration as a commodity trading advisor.

On April 16 1976, the Commission instituted an administrative proceeding, pursuant to Sections 4n(7)

[2] "A 'commodity option' is a contractual right to buy, or sell, a commodity or commodity future by some specific date at a specified, fixed price, known as the 'striking price.' A contract entitling its owner to purchase the commodity is known as a 'call,' and a contract entitling its owner to sell is called a 'put'." *British American Commodity Options Corp.* v. *Bagley*, 552 F. 2d 482, 484–485 (C.A. 2), certiorari denied, November 7, 1977 (Nos. 77–96, 77–204).

and 8a(2) of the Act, 7 U.S.C. 6n(7), 12a(2), to determine whether petitioner should be registered.[3] Although the administrative complaint expressly notified petitioner that in accordance with Section 8a(2), registration would not be granted pending a final determination of the petitioner's fitness for registration, petitioner continued to offer commodity trading advice to its option customers.

3. The Commission, in July 1976, instituted an action in the United States District Court for the Southern District of New York under Section 6c of the Act, 7 U.S.C. 13a–1, to enjoin petitioner from further violation of the registration requirement for commodity trading advisors. At the conclusion of the Commission's case the district court granted petitioner's motion for a directed verdict and denied the Commission's motion for preliminary injunction (Pet. App. 1a–14a). The court noted that the Commission

[3] See pp. 3–4, *supra*. The administrative complaint alleged that (1) in 1970 and 1973, John Forma, petitioner's president and sole shareholder, had been twice enjoined by a federal court from violating the Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U.S.C. (1970 ed.) 78a *et seq.*, and the regulations thereunder, and in 1975 had been barred by the Securities and Exchange Commission from further association with any broker, dealer, registered investment company or registered investment adviser; (2) since October 1975, petitioner had engaged in the business of offering commodity trading advice without being registered with the Commission as a commodity trading advisor; (3) since October 1975, petitioner had been and was engaged in cheating and defrauding purchasers and prospective purchasers of commodity options in violation of anti-fraud provisions under the Act; and (4) petitioner had refused the Commission's staff access to petitioner's books and records.

ad offered no proof that petitioner was defrauding r misleading its customers, and stated that the issu- nce of a temporary injunction in these circumstances ould be "too harsh a result," in view of the adverse ffect of an injunction on petitioner's reputation and legitimate" business activities (Pet. App. 12a–13a).

The court of appeals reversed and remanded for ntry of a preliminary injunction (Pet. App. 24a–9a). It accepted the district court's finding (Pet. pp. 6a, 32a) that petitioner, although not registered, as continuing to act as a commodity trading ad- isor. On this basis, the court of appeals determined nat the Commission had made a *prima facie* showing nat petitioner was violating and would continue to iolate the Act's registration requirements. It held Pet. App. 39a):

> [O]nce the Commission has made a prima facie showing that violations of the registration provisions of the Act have occurred and are likely of repetition and that the Commission has a tenable basis for commencing administrative proceedings to inquire into an applicant's fitness, an injunction must issue.

The court of appeals rejected the district court's ew that proof of fraud or other misconduct was ecessary before petitioner's activities could be en- oined, concluding that proof of violations of the reg- tration requirement "alone are sufficient to require e injunction in this case" (Pet. App. 36a). The court ased its determination on Congress' intent, manifest the Act's statutory scheme, that "persons engaged

in the defined regulated activities within the commodities business are not to operate without being registered" and that the Commission be "empowered to seek injunctive prohibitions against violations of any provisions of the Act, including registration provisions" (Pet. App. 30a).

The court also ruled that the district court had given undue weight to the private business interest of petitioner in continuing its unlawful activities as a commodity trading advisor. It found that "to the extent that * * * [petitioner's] business activities have succeeded through the unlawful furnishing of advice while not registered, * * * [petitioner] has been acting at its own peril" and "[a] court of equity is under no duty 'to protect illegitimate profits or business which is conducted illegally'" (Pet. App. 38a–39a) (citation omitted).

ARGUMENT

The decision of the court of appeals is correct and the petition presents no question warranting review by this Court.

1. Because the injunctive relief contemplated by Section 6c, like that provided by other regulatory legislation, is remedial in nature, designed to prevent injury to the public and to deter future illegal conduct,[4] restrictive concepts traditionally associated with

[4] *E.g.*, *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193; *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329; *Securities and Exchange Commission* v. *World Radio Mission, Inc.*, 544 F. 2d 535, 541 (C.A. 1); *Securities and Exchange Commission* v. *Management Dynamics, Inc.*, 515 F. 2d

255-778—78——2

litigation such as proof of irreparable injury equacy of other remedies, are inapplicable.[5] courts have consistently held that an enforce- ency such as the Commission has made the showing for a preliminary injunction if it ented a *prima facie* case that the defendant aged, or is engaging, in unlawful conduct, demonstrated a "reasonable likelihood of iolations."[6]

C.A. 2). The court of appeals and other courts have the case law developed under the federal securities laws arly pertinent to proceedings under Section 6c (Pet. See also *Commodity Futures Trading Commission* v. *lony Commodity Options, Ltd.*, 434 F. Supp. 911, 919 ; *Kelly* v. *Carr*, CCH Comm. Fut. L. Rep. ¶ 20,517, 133 (W.D. Mich.); *Commodity Futures Trading Com- J. S. Love & Associates Options, Ltd.*, 422 F. Supp. 652, .Y.).

es and Exchange Commission v. *Capital Gains Re- eau, Inc.*, *supra*, 375 U.S. at 195; *Securities and Ex- mmission* v. *Management Dynamics, Inc.*, *supra*, 515 F. *Securities and Exchange Commision* v. *Manor Nursing c.*, 458 F. 2d 1082, 1102 (C.A. 2); *Kelly* v. *Carr*, *supra*, n. Fut. L. Rep. ¶ 20,517, at p. 22,133; *Commodity Fu- ing Commission* v. *J. S. Love & Associates Options*, 442 F. Supp. at 661.

curities and Exchange Commission v. *Management Dy- ., supra*, 515 F. 2d at 807; *Securities and Exchange* v. *First American Bank & Trust Co.*, 481 F. 2d 673, A. 8); *Securities and Exchange Commission* v. *Manor nters, Inc.*, *supra*, 458 F. 2d at 1100; *Securities and Commission* v. *Keller Corp.*, 323 F. 2d 397, 402 (C.A. dity Futures Trading Commission* v. *Crown Colony Options, Ltd.*, *supra*, 434 F. Supp. at 919; *Kelley* v CCH Comm. Fut. L. Rep. ¶ 20,517, at p. 22,133.

The court of appeals applied this well-settled standard in determining that the Commission was entitled to injunctive relief on the showing it made. As the court stated (Pet. App. 35a):

> [L]ikelihood of future violations may be inferred from past unlawful conduct. In the present case, not only did British American maintain that its activities were legitimate, but it persisted in offering commodity trading advice right up to the day of the hearing in the district court. Under these circumstances, the likelihood of future violations, if not restrained, is clear.

2. Petitioner nevertheless contends (Pet. 8–9) that the court of appeals denied petitioner a hearing in the district court by directing the entry of a preliminary injunction. But petitioner makes no claim of any material factual issue which might be addressed in a further hearing. To the contrary, petitioner does not dispute—and did not dispute in the district court[7]—that it offered commodity trading advice to customers through the mails and other instrumentalities of interstate commerce; that it was not registered with the Commission as a commodity trading advisor; and that it continued to do business in an unregistered capacity until enjoined by the district court. Petitioner thus has admitted the facts necessary to support an injunction and reopening the hearing would serve no useful purpose. Due process does not require

[7] See Court of Appeals Appendix 102–103.

hearing where no factual controversy
litigant seeks only to contravene the
o be applied.[8]
court of appeals "[preclude] the Dis-
n exercising its equitable discretion"
e a district court has broad latitude in
able remedies, an appellate court may
junction issue where necessary "effec-
ess proved violations" of law. *United*
lu Pont de Nemours & Co., 366 U.S.
er similar circumstances involving
ng violations of law, courts of appeals
ruled that injunctive relief was re-
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ission, Inc., supra, 544 F.2d at 541;
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1); *Walling* v. *Panther Creek Mines,*
C.A. 7). In *Albemarle Paper Co.* v.
405, 416, this Court explained:

etionary choices are not left to a
nclination, but to its judgment; and

gan County, Inc. v. *Federal Power Commis-*
5. 1128 (C.A. D.C.); *Virginia Electric and*
l Power Commission, 351 F. 2d 408, 410 (C.A.
rt & Isbrandtsen Lines v. *Federal Maritime*
2d 185, 194 (C.A. 9); *Producers Livestock*
United States, 241 F. 2d, 192, 196 (C.A. 10).
nver Union Stockyard Co. v. *Producers Live-*
n, 356 U.S. 282.
er cites (Pet. 8–10), unlike the instant case.
lentiary proceedings to resolve material issues

its judgment is to be guided by sound legal principles."

3. Although petitioner claims (Pet. 11) that "7 U.S.C. 12(a)(2) is [u]nconstitutional," its argument appears not to be that Section 12[a] (2) is unconstitutional on its face, but rather that the Commission in this case unnecessarily prolonged the proceeding on petitioner's application for registration, thus allegedly forcing petitioner out of business "in contravention of every known concept of due process and fair play" (Pet. 14). That argument is unfounded.

The Commission would have shirked its statutory responsibility if it had rendered a decision concerning petitioner's fitness for registration without full development of the facts. In this case, the proper discharge of the Commission's responsibility required a thorough adjudicative proceeding on petitioner's fitness, and there is no evidence that the Commission acted other than in good faith.

Furthermore, petitioner itself is responsible for much of the delay in reaching a decision. Petitioner acted to prolong the administrative proceeding[9] and sought to enjoin it. *British American Commodity Options Corp.* v. *Bagley,* S.D. N.Y., 76 Civ. 1984. If petitioner had at any time believed it was being prejudiced by delay in the administrative proceeding, it could have brought an action under the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. (1976 ed.) 706(1).

[9] See Court of Appeals Appendix at 166–167.

ourt of appeals did not decide
)(2) was unfairly applied to
ue is not involved in this case.
ated in a petition for review of
l of petitioner's application for
odity trading advisor, which is
urt of Appeals for the Second
ican Commodity Options Corp.
Trading Commission, C.A. 2,

argument misconceives the
(a)(2). By its terms, that sec-
proceedings for suspension or
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thority to refuse applicants for
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ent (Pet. 15–16) that the Commis-
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e on *Barchi* v. *Sarafan*, 436 F. Supp.
d, since it involved a summary sus-
a person, unlike petitioner, who was
a particular occupation.

4. Petitioner also argues (Pet. 11) that, because it was lawfully operating as a commodity option dealer without a license prior to the time it applied for registration with the Commission as a commodity trading advisor, it was entitled under section 9(b) of the Administrative Procedure Act, 5 U.S.C. (1976 ed.) 558(c), to operate as a commodity trading advisor until the Commission acted on its application, citing *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line Railroad Co.*, 353 U.S. 436.

Section 9(b) provides in pertinent part:

> When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

The purpose of this provision is "to protect a person *with a license* from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded." *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line Railroad Co., supra,* 353 U.S. at 439 (emphasis added). See also *Committee for Open Media* v. *Federal Communications Commission,* 543 F. 2d 861, 867 (C.A.D.C.). For Section 9(b) to apply, "there must be a license outstanding" and there "must have been filed a timely and sufficient application to continue the existing operation." *Pan-Atlantic, supra,* 353 U.S. at 439. Since petitioner has never been licensed as a commodity trading advisor, and did not make "timely" applica-

activity for which the
t invoke Section 9(b).[12]
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39a).
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7 C.F.R. 32.3. The Commis-
e Matter of British Ameri-
TC Docket Nos. 76–15 and
209.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978